MAY 17 1993

93-265

Case No. 92-2282

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1992

THOMAS A. CRUMP, Petitioner

v.

U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES;
ENVIRONMENTAL PROTECTION AGENCY;
UNITED STATES CONGRESS;
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION;
THE GENERAL ASSEMBLY, VIRGINIA;
PRESIDENT OF THE UNITED STATES;
GOVERNOR OF VIRGINIA
FOOD & DRUG ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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MAY 15, 1993

10 pp

QUESTIONS PRESENTED

Should a Federal Court of Appeals for the Fourth Circuit have recognized the following questions?

1. Will the court upon review conclude that cigarettes are, as a matter of law, defective and unreasonably dangerous for human consumption, because when used as intended, they cause lung cancer, heart disease, emphysema and other illnesses?

2. If cigarettes are unfit for human consumption then when non-smokers are subjected involuntarily to the arbitrary control of environmental tobacco smoke by smokers in buildings, such as the Henrico County Courthouse in Richmond, VA and other buildings as well as all with a central heating and cooling system, then would not the liabilities, civil rights of the non-smokers be violated by the smokers?

3. If the use of cigarettes are unfit

for human consumption or violating the civil rights of the people, then is it not a violation of the constitution of the United States Constitution for the people to consume cigarettes?

4. If it is a violation of the United States Constitution for people to consume cigarettes, or <u>if they are unfit for human consumption</u>, then is it not illegal for manufacturers to make cigarettes?, to give; or cause to sell to the public?

5. If cigarettes are unfit for human consumption, or violate the civil rights of the people, or violate the United States Constitution, or illegal to make or sell, then is it not the fundamental right of the people to live, work in and the pursuit of happiness in a cigarette free environment?

6. Did the United States Congress make cigarettes legal for human consumption by their act of the Federal Cigarette

Labeling and Advertising Act of 1965 or with a continuing series of federal statutes or other acts, with the knowledge of the Surgeon General's Report in 1964 & Later Reports on smoking and health?

7. Did the President of the United States also make cigarettes legal by signing the same act or acts, with also the knowledge of the Surgeon General's reports?

8. Did the General Assembly,Virginia make cigarettes legal for human consumption by their bill that striped local governments of their power to enact no-smoking ordinances, for a year, or by later restrictions on smoking on other acts that permitted smoking, also with the knowledge of the Surgeon General's reports?

9. Should not the Judiciary disregard all laws by the United States Government

and the State of Virginia's Government that make cigarettes a legal product because they are defective and unreasonably dangerous (unconstitutional) for human consumption?

10. Did not the Governor of Virginia also make cigarettes legal for human consumption by signing the bills, also with the knowledge of the Surgeon General's reports?

11. By the aforesaid, Legalizing smoking & regulating then did not the federal respondents deprive the people of life, liberty by exposing the people to all the inherent dangers to the consumption of _____ without due process of law?

12. By the aforesaid legalizing smoking & regulating laws did not the State of Virginia respondents abridge the privileges or immunities of citizens of the United States or life, liberty, without due process of law or denied

persons within its jurisdiction the equal protection of the laws by exposing the citizens to all the inherent dangers by the consumption of cigarettes?

13. When the peoples (Petitioner) constitutional rights are being violated by their own state and federal governments, then do not the people have the constitutional right to petition (This Petition) the government (Federal Courts) for a redress of grievance?

14. Can state officers be held responsible for acts of the state which they act on, which are void because unconstitutional?

15. Should not the United States Congress have nullified and made void all State of Virginia legislation and state action of every kind, which impairs the privileges and immunities of citizens of the United States on which injures them in life, liberty or property without due

process of law or which dies to any of them the equal protection of the law, because of this matter that cigarettes are defective and unreasonably dangerous for human consumption?

16. Should the United States Congress have nullified and made void all federal legislation and federal action of every kind, when the people are deprived of life, liberty, or property, without due process of law, because of this matter that cigarettes are defective and unreasonably dangerous for human consumption?

17. Does not when a complaint arises under the constitution of the United States, its citizens have standing to sue?

18. Are not the Federal Courts given jurisdiction of all cases, (This Petition). No matter who are the parties to the suit, in law and equity arising

under the Federal Constitution, laws? Can a state claim or federal government claim immunity from this petition by the doctrine of sovereign immunity, when they both are violating the very civil rights of their people that they have the constitutional duty to protect?

19. When the Legislature and the Executive branches have not only refused to take action to protect the welfare of the people from the defective and unreasonably dangerous for human consumption cigarette, but taken action (This Case) to protect the continued consumption of cigarettes, then is there any other government to petition for a redress of grievances but the Judicial?

20. If when so many keys are needed to open all the many doors to prevail in court preceding, that are not known because of the lack of knowledge by a petitioner preceding pro se, but basic

information of the injustices to the people by their own governments is presented to the courts, does this justify a delay or denial IN THE ESTABLISH JUSTICE in rescuing the people from needless sickness and death of so many people due to the consumption of cigarettes?

21. To further protect the people form the most lethal product that is still legally sold in this country, "cigarettes", should not the courts have ruled all laws pertaining to cigarettes making them legal for human consumption unconstitutional? Should this court?

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12. ORDER: Plaintiff --- has the right to oppose defendant's motion to dismiss --- with any matter he wishes to offer in rebuttal --- stating his version of the relevant facts and law, or affidavits --- file any other material he deems appropriate, United States District Court for The Eastern District of Virginia Richmond Division 5/26/92 App 31

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THOMAS A. CRUMP petition for a writ of certiorari to The United State Court of Appeals for The Fourth Circuit, OPINION decided February 16, 1993, Thomas A. Crump v. U.S. Department of Health & Human Services; Environmental Protection Agency; United States Congress; Occupational Safety & Health Administration; The General Assembly, Virginia; President of The United States; Governor of Virginia: Food & Drug Administration, No. 92-2282

OPINIONS BELOW

United States Court of Appeals for The Fourth Circuit Decided February 16, 1993, No. 92-2282 Before HALL and PHILLIPS, Circuit Judge, and BUTZNER, Senior Circuit Judge, AFFIRMED district court's order dismissing all the Defendants from action pursuant to the doctrine of Sovereign Immunity and for failure to state a claim for relief. App. at 1

JURISDICTION

The jurisdiction of this court is invoked for writ of certiorari: United States Court of Appeals for The Fourth Circuit OPINION decided February 16, 1993.

1. The Constitution of The United States.

2. The courts given jurisdiction of all cases in law and equity arising under the Federal Constitution, laws.

3. The State of Virginia has violated the privileges or immunities of Citizens of The United States in the 14th Amendment, Section 1 of The U. S. Constitution (by making The consumption of Cigarettes Legal and Regulating The use Thereof.)

4. Also, The united States Government has by their regulating health warning and advertising of cigarettes, made them a legal product to be consumed, causing people to be deprived of Life Liberty in

the 5th Amendment of the U.S. Constitution.

5. Does not when a complaint arises under The Constitution of The United States, its citizens have standing to sue?

6. When the people's (petitioner) constitutional rights are being violated by their own state and federal governments, then do not the people have the constitutional right of petition (this petition) the government (Federal Courts) for a redress of grievance?

7. Judge Eugene Bosen in the Circuit Court of Washington County, Miss. in "Case No. 91-12, 355 (B) (W) of Jeanette Wilks and Jessie Willie Bell vs. The American Tobacco Company and The New Deal Tobacco and Candy Company, Inc. has on the May 11, 1993 Ruling that the Judge said, "The court has considered this matter anew and concludes that

cigarettes are, as a matter of law, defective and unreasonably dangerous for human consumption. Cigarettes are defective because used as intended they cause cancer, emphysema, heart disease and other illnesses." Cigarettes are the most lethal product which may be legally sold in this country. According to the Affidavit of Dr. David Burns, Senior Reviewer of several Surgeon General's Reports, cigarettes kill approximately 435,000 persons annually from cancer, emphysema and heart disease. Cigarettes kill more Americans each year than aids, automobile accidents, alcohol, fires, heroin, morphine, cocaine, suicide and homicide combined. One in four two-pack per day smokes will die of lung cancer. Cigarettes kill 40% of the people who smoke them. The health cost to the nation from cigarettes smoking exceeds $50 billion per year. The health costs

associated with cigarette smoking fall upon everyone, the smoker and his family, non-smokers, insurance companies, employers, employees, physicians, hospitals and the taxpayers who pay the bills for many of those hospitals. Everyone, that is, except the cigarette manufacturer.

8. Thomas A. Crump, petitioner, was in the Henrico County Court house in November, 1991, when he was subjected involuntarily to arbitrary control of smoke by people smoking in the same corridor, even though he wa sitting in a section of the corridor that had a sign that said "No Smoking." Upon getting up he saw other signs in the same corridor that said "Smoking Permitted."

This state law of posting signs of "Smoking Permitted' and other signs of "No Smoking" in the same building or corridor is circulating this dangerous

smoke unfit for human consumption is in reality a "sham."

By the aforesaid legalizing smoking & regulating laws did not The State of Virginia respondents abridge the privileges or immunities of citizens of The United States of Life, Liberty, without due process of law or denied persons within its jurisdiction the equal protection of the laws by exposing the citizens to all the inherent dangers by the consumption of cigarettes?

9. Should not The United States Congress have nullified and made void all State of Virginia legislation and state action of every kind, which impairs the privileges and immunities of citizens of The United States on which injuries them in Life, Liberty or property without due process of Law or which denies to any of them the equal protection of the Law, because of this matter that cigarettes

are defected and unreasonably dangerous for human consumption?

10. When the legislature and the executive branches have not only refused to take action to protect the welfare of the people from the defective and unreasonably dangerous for human consumption cigarette, but taken action (this case) to protect the continued consumption of cigarettes, then is there any other government to petition for a redress of grievances but the judicial?

11. If when so many keys are needed to open all the many doors to prevail in court preceding, that some are not known because of the lack of knowledge by a petitioner preceding prose, but basic information of the injustices to the people by their own government is presented to the courts, does this justify a delay or denial IN THE ESTABLISH JUSTICE in rescuing the people

from needless sickness and death of so many people due to the consumption of cigarettes?

12. To further protect the people from the most lethal product that is still legally sold in this country, "cigarettes," should not the courts have ruled all laws pertaining to cigarettes making them legal for human consumption unconstitutional? Should this court?

13. This issue of the people smoking cigarettes, having had a ruling by the Circuit Court of Washington County, Miss, as aforesaid, has an important question of federal law, the "Violation" of the people's civil rights" which has not been but should be settled by this court.

14. I am asking the learned Judge of Court to take under advisement this action for a redress of stated grievances in compliance with our constitution on this issue as the constitution has stated

that we the people have an "ESTABLISH JUSTICE" and this "ESTABLISH JUSTICE" is a never ending right of the people, not to be infringed on by action or absence of action on the part of our government.

15. How our United States Representative, Thomas J. Bliley, Jr., has gone so far as to side with the Tobacco Institute in pressing the Environmental Protection Agency to withdraw or revise a draft report that incorporates the finding that second hand tobacco smoke causes 32,000 health disease deaths among non-smokers.

This action by Representative Thomas J. Bliley, Jr. could cause more needless thousands of deaths of Americans and should not be taken lightly by the people by those in government.

16. That Virginia's governor has the power to stop cigarette manufacturers from making such an unsafe product. That

government is, or ought to be, instituted for the common benefit, protection, security of the people, nation, or community.

17. The ARBITRARY control SMOKERS have over non-smokers that involuntarily force the non-smokers to inhale their noxious, class A carcinogen, deadly smoke from their cigarettes, is an unconscionable, "un-natural" and unconstitutional act, and a crime against humanity.

CONCLUSION

This issue of the people smoking cigarettes, having had a ruling by the Circuity Court of Washington County, Miss. as aforesaid, has an important question of Federal Law, The "Violation of the People's Civil Rights" which has not been but should be settled by this court.

_____ Respectfully submitted

(Date) _____

(804)740-7079 Thomas A. Crump, Prose

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CONSTITUTION PROVISIONS, STATUES, AND REGULATIONS

1. UNITED STATES CONSTITUTION: The fundamental or organic Law of the U.S. framed in 1787 by The Constitutional Convention. It went into effect March 4, 1989;

2. PREAMBLE: We, The people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for The United States of America;

3. NATURAL RIGHTS: Any Right that exists by virtue of Natural Law: A principle or body of laws considered as derived from nature: The particular combination of qualities belonging to a person --- by birth:

4. CIVIL RIGHTS: Rights to personal liberty established by the ... 14th Amendments to the U.S. Constitution ---.

5. 1st AMENDMENT: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech --- or the right of the people --- to petition the government for a redress of grievances.

6. 9th AMENDMENT: The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

7. 10th AMENDMENT: The powers not delegated to the United States by The Constitution, NOR prohibited by it to The States, are reserved to the States respectively, or to the people.

8. 14th AMENDMENT: Section 1. --- No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of The United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws: SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

9. ARTICLE III, Section 2, CLAUSE 1: The judicial power shall extend to all cases, in law and equity, arising under this constitution, The Law of the United States --- to controversies to which The United States shall be a party ---: CLAUSE 2: In all cases --- and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have Appellate jurisdiction, both as to law and to fact ---.

10. FED, R. CIV. P. 12 (b) (1), lack of jurisdiction over the subject matter; (2), lack of jurisdiction over the person.

11. FED, R. CIV, P. 12 (b) (6), Failure to state a claim upon which relief can be granted.

5th AMENDMENT: --- nor shall any person be deprived of life, liberty, or property, without due process of law ---

12. Rule of THE SUPREME COURT of THE UNITED STATES: Rule 10: CONSIDERAT GOVERNING REVIEW ON WRIT OF CERTIORARI:

·1. (a) when a --- United States Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this court---.

13. RIGHTS PROVIDED IN THE VIRGINIA CONSTITUTION:

ARTICLE 1 SECTION 1: That all; men are by nature equally free and independent and have certain inherent rights of which,

when They enter into a state of society, they cannot, by any compact, deprive their posterity; namely, the enjoyment of Life and Liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

SECTION 2: That all power is vested in and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them.

SECTION 3: That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community;

SECTION 5: The the Legislative, Executive and Judicial departments of the Commonwealth should be separate and distinct, and that the members thereof may be restrained from oppression, by feeling and participating the burthens of

the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken---.

SECTION 11: That no person shall be deprived of his Life, Liberty, or property without due process of law:

SECTION 12: That the freedom of speech is --- are among the great bulwarks of Liberty, and can never be restrained except by despotic governments; That any citizen may freely speak, write, and publish his sentiments on all subjects, --- That the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people---to petition the government for a redress of grievances.

SECTION 15: That no free government, nor the blessings of Liberty, can be preserved to any people, but by a firm adherence to justice, moderation,

temperance, frugality and virtue; by frequent recurrence to fundalmental principles. And by the recognition by all citizens that they have duties as well as rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed.

SECTION 16: That religion or the duty which we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction--- All men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other---.

SECTION 17: The Rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed.

STATEMENT OF THE CASE

Thomas A. Crump, petitioner, was in the Henrico County Courthouse in November, 1991, when he was subjected involuntarily to arbitrary control of smoke by people smoking in the same corridor, even though he was setting in a section of the corridor that had a sign that said "No Smoking". Upon getting up he saw other signs in the same corridor that said "Smoking Permitted".

This state law of posting signs of "Smoking Permitted" and other signs of "No Smoking" in the same building or corridor is circulating this dangerous smoke unfit for human consumption is in reality a "sham". Petitioner has listed a number of the 4,000 chemicals and cancer producing and noxious ingredients contained in cigarette smoke, a class A carcinogen: a. nicotine, a poisonous alkaloid; b. benzene, as used as a

solvent for fats and in making lacquers, varnishes --; c. often harmful substances called tars -- used for protecting surfaces, etc.; d. carbon monoxide, a colorless, odorless, highly poisonous gas; e. Hydrogen Cyanide, the chemical used in gas chambers to kill convicted criminals; f. formaldehyde, a colorless, pungent gas, as used in funeral homes in embalming the dead.

A study by Dr. Michael Cummings that found that nearly all non-smokers have traces of a Nicotine derivative in their systems means recent exposure to tobacco smoke - more than half of the reported exposures occurred in areas where non-smokers don't have the option of avoiding the exposure, scientists said June 12, 1989. A forum talk show - Little is Known of Cancer Stages - was held in Richmond, VA on April 27, 1989 sponsored by the Pathology Department of VA

Commonwealth University, Medical College of Virginia Campus, attended by about 130 medical scientists from around the country -- suggest that several events have to occur before concern. The first event may be exposure to particular chemicals. The next step is exposure to a promoting agent -- now cells begin expanding. The next stage is progression, when cells pass from pre-cancerous stages to cancerous. Each step is -- only hazily understood --. Dr. Farber, Professor of Pathology at the University of Toronto, is a leading investigator into the mechanics of how cancer arises in the body's tissues, organs and bloodstream. Dr. Farber said, "he believes that cancer's development probably is due to a mixture of people's genetic factors and environmental exposures. Since we can't change the genes, let's see what the environmental

factors are and change them."

Petitioner went on to say how the different departments of the federal government and state government should have already stopped the manufacturing of the deadly cigarettes.

Of how the tobacco institute agreed to a compromise in the 1990 General Assembly on the Virginia Clean Indoor Act, which restricted public smoking but preempted more stringent local ordinances.

How our United States Representative, Thomas J. Bliley, Jr. (another Virginia advocate of the deadly cigarette) has gone so far as to side with the tobacco institute in pressing the Environmental Protection Agency to withdraw or revise a draft report that incorporates the finding that second hand tobacco smoke causes 32,000 health disease deaths among non-smokers.

This action by Rep. Thomas J. Bliley, Jr.

could cause more needless thousands of deaths of Americans and should not be taken lightly by the people or by those in government. Sometimes those intrusted in government are our problem!

That Virginia's governor has the power to stop the cigarette manufacturers from making such an unsafe product. That this government is, or ought to be, instituted for the common benefit, protection, security of the people, nation, or community compared with the battle deaths of those patriots who gave their lives for our liberty in World War II to the senseless smoking-related deaths of a similar period of time. World War II - 12/7/1941 to 12/21/46 - 6 years - deaths: 292,131.

The ARBITRARY control SMOKERS have over non-smokers that involuntarily force the non-smokers to inhale their noxious, class A carcinogen, deadly smoke from

their cigarettes, is an unconscionable, "un-natural" and unconstitutional act, and a crime against humanity.

I am asking the learned Judge of the Court to take under advisement this petition for a redress of stated grievances in compliance with our Constitution on this issue as the constitution as stated that we the people have an "ESTABLISH JUSTICE" AND THIS "establish justice" is a never ending right of the people, not to be infringed on by action or absence of action on the part of our government.

For the Life of the People and the good of the government, this petition for certiorari should be granted.

Respectfully submitted,

_____ Thomas A. Crump
Date 8653 Rio Grande Rd.
Richmond, VA 23229
(804) 740-7079
Pro se

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The Secretary of Health & Human Services has said that cigarettes when used as intended causes death -- The fact that over 434,000 Americans a year - 1,200 a day; 50 each hour - lose their lives from smoking-related diseases such as lung cancer, heart disease and emphysema.

2. These senseless, needless deaths of the people should be protected from the consumption of cigarettes.

3. Non-smokers are subjected involuntarily to the arbitrary control of smokers in all buildings that have central heating or cooling systems.

4. As stated in the question, the State of Virginia has violated the privileges or immunities of citizens of the United States in the 14th Amendment, Section 1, of the U. S. Constitution, by making the

consumption of cigarettes legal and regulating the use thereof.

5. Also, the United States Government has, by their regulating health warning and advertising of cigarettes, made them a legal product to be consumed, causing people to be deprived of life, liberty in the 5th Amendment of the U. S. Constitution.

6. Judge Eugene Bosen in the Circuit Court of Washington County, Miss. in "case no. 91-12, 355 (B) (@) of Jeanette Wilks and Jessie Willie Bell vs. The American Tobacco Company and the New Deal Tobacco and Candy Company, Inc. has on the May 11, 1993 Ruling that the Judge said, 'The Court has considered this mater anew and concludes that cigarettes are, as a matter of law, defective and unreasonably dangerous for human consumption. Cigarettes are defective because used as intended they cause

cancer, emphysema, heart disease and other illnesses.'"

7. This issue of the people smoking cigarettes, having had a ruling by the Circuit Court of Washington County, Miss. as aforesaid, has an important question of Federal Law, one "violation of the people's civil rights" which has not been but should be settled by this court. therein expressed.

Respectfully submitted,

Thomas A. Crump, pro se
8653 Rio Grande Road
Richmond, VA 23229
(804) 740-7079

_____

Date

UNPUBLISHED
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

Thomas A. Crump
Plaintiff

v.

US DEPARTMENT OF HEALTH & HUMAN SERVICES; ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES CONGRESS; OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION; THE GENERAL ASSEMBLY OF VIRGINIA; PRESIDENT OF THE UNITED STATES; GOVERNOR OF VIRGINIA; FOOD & DRUG ADMINISTRATION
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-92-336)

Submitted: February 11, 1993

Decided: February 16, 1993

Before HALL and PHILLIPS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Thomas A. Crump, Appellant Pro Se. Robert William Jaspen, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia; William Mark Dunn, Assistant Attorney General, Richmond, Virginia for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM

Thomas A. Crump appeals from the district court's orders dismissing all the Defendants from the action, pursuant to the doctrine of sovereign immunity and for failure to state a claim of relief. Our review of the record and the district court's opinions disclose that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Crump v HHS, No. CA-92-336(E.D. Va. Aug.11, 1992;Oct 9, 1992). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATE COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

March 9, 1993

NO. 92-2282

CA-92-336

CRUMP v. HHS

M A N D A T E

The judgment of this court dated 2/16/93

Takes effect today.

BERT M. MONTAGUE

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO.92-2282
CA-92-336

FILED
November 10, 1992

THOMAS A. CRUMP

Plaintiff - Appellant

v.

U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES; ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES CONGRESS; OCCUPATIONAL SAFETY 7 HEALTH ADMINISTRATION; THE GENERAL ASSEMBLY, VIRGINIA; PRESIDENT OF THE UNITED STATES; GOVERNOR OF VIRGINIA; FOOD & DRUG ADMINISTRATION

Defendants - Appellees

O R D E R

Appellant has filed a pro se request for an extension of time to file an informal brief. The court extends the time until December 11, 1992.

For The Court - by Direction

CLERK /s/ Bert M. Montague

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 92-2282 Filed

CA-92-336 October 22, 1992

Crump v. HHS

O R D E R

The Court directs that the parties shall be permitted one joint brief per side PURSUANT to Local Rule 28 and I.O.P. 28.2, and that the parties on each side shall share the time allowed for oral argument. Each side shall notify the court of the Attorney who has been designated as Lead Counsel within ten days of the date of this order.

For the Court - By Direction

/s/ Bert M. Montague

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THOMAS A. CRUMP,
Plaintiff,

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, et al.,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, plaintiff's claims against the state defendants, the Virginia General Assembly and Governor of Virginia will be and hereby are DISMISSED pursuant to Fed.R.Div.P.12(b)(1),(2). Plaintiff is reminded that should he decide to appeal this decision, he must file a notice of appeal with the Clerk of the district court within thirty (30) days from the entry of this Order.Fed.R. Appellate P.4(a).

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: Oct. 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THOMAS A. CRUMP,
Plaintiff,

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, et al.,
Defendants.

MEMORANDUM OPINION

1.

THIS MATTER is before the Court on a motion to dismiss by defendants, the Virginia General Assembly and the Governor of Virginia. For the reasons stated herein, the defendants' motion to dismiss is GRANTED.

On April 20, 1992, plaintiff, proceeding pro se, filed a suit in Chancery in Henrico County Circuit Court, against the following defendants:

> The Department of Health & Human Services;
> The Environmental Protection Agency;
> The United States Congress;

The Occupation Safety &
Health Administration;
The Virginia General Assembly;
The President of the United
States;
The Governor of Virginia; and
The Food & Drug Administration

Plaintiff alleges that in November, 1991, while he was in the Henrico County Courts Building, he observed someone smoking a cigarette in a posted no-smoking area. Plaintiff also alleged that there was a smoking-permitted sign posted nearby. Plaintiff claims that his "natural and civil" rights as provided by the Preamble and the 1st,9th,10th and 14th amendments to the United States Constitution and the rights provided in the Virginia Constitution were violated by the Virginia General Assembly and Governor of Virginia for their failure to protect him from passive cigarette smoke which he was allegedly subjected to in the Henrico Courts Building.

Mr. Crump prays for the Court to enjoin the state defendants to take immediate action. In the event the defendants fail to take immediate action, he requests that this Court order the prohibition of all smoking in the Henrico Courts Building and all buildings in Virginia of all smoking in the Henrico Courts Building and all buildings in Virginia. Additionally, Mr. Crump requests that this Court close all cigarette manufacturing plants in the United States and provide a smoke-free environment for all people.

On May 13, 1992, the United States Attorney, representing the federal defendants, removed the action from the Henrico County Circuit Court to this Court. On May 19, 1992, the federal government filed a motion to dismiss on behalf of all federal defendants based on sovereign immunity and failure to state a

federal cause of action for which relief may be granted. The plaintiff was sent a Roseboro Order directing him to file any response by June 9, 1992. Plaintiff was granted two extensions of time in which to file his response, and on July 17, 1992, his response was filed.

On July 13, 1992 the Virginia Attorney General, representing the state defendants, the General Assembly and the Governor of Virginia, filed copies of its demurrers and motions to dismiss which had been earlier filed in the state court action.

On August 11, 1992 the federal defendants' motion to dismiss was granted under the doctrine of sovereign immunity.

11.

As to the state defendants, they are also immune from suit under the doctrine of sovereign immunity. Sovereign immunity applies not only to suits

against the United States, but to state governments as well. In effect, the doctrine of state sovereign immunity parallels federal sovereign immunity which is rooted in the common-law theory of the immunity of the sovereign (government).

It is well settled that absent legislative consent or a statutory waiver of immunity federal and state governments are immune from suit and this Court is without jurisdiction to entertain an action. See Supreme Court of Virginia v. Consumer Union, 446 U.S. 719,733(1980) (absolute immunity accorded to state legislators extends to declaratory and injunctive relief; Messina v. Burden, 22 Va.301, 321 S.E. 2d 657,661 (1984) (high level state government officials are protected by the doctrine of sovereign immunity).

Where, as here, the defendant

General Assembly and the Governor of Virginia are acting in their official capacities, an action against the state defendants is deemed to be against the Commonwealth of Virginia. Kentucky v. Graham, 473 U.S. 159, 167-68 (1985). As such, the state defendants are immune from suit, and plaintiff's action is DISMISSED for lack of jurisdiction against the state defendants. Fed.R.Civ.Proc.12(b)(1) & (2).

Let the Clerk send copies of this Order to all parties.

And it is SO ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

Date: Oct. 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
Sept. 10, 1992

THOMAS A. CRUMP,
Plaintiff

V.

DEPARTMENT OF HEALTH &
HUMAN SERVICES, et al.,

Defendants

AMENDED ORDER

On August 11, 1992, the Court dismissed plaintiff's claims against the federal defendants pursuant to Fed. R. Civ. P.12(b) 1, (2) and (6). Plaintiff was told that should he decide to appeal this decision, he must file a notice of appeal with the Clerk of the District Court within thirty (30) days from the entry of This Order, Fed. R. Appellate P. 4(a), however, since the federal government is a party, the plaintiff has sixty (60) days from entry of judgment to file an appeal with the Fourth Circuit.

This correction has no substantive effect on the court's dismissal; it is only intended to give the plaintiff notice that he has 60 days (rather than 30 days) to appeal the decision and file a notice of appeal with the Clerk of the District Court.

And it is so ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

Date Sept. 10, 1992

# # # # # # #

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action
NO. 92 CV336

FILED
Aug. 11, 1992

THOMAS A. CRUMP,
Plaintiff

V.

DEPARTMENT OF HEALTH &
HUMAN SERVICES, et al.,
Defendants

ORDER

For the reasons stated in the accompanying memorandum opinion, plaintiff's claims against the federal defendants: The Department of Health & Human Services; The Environmental Protection Agency; The United States Congress; The Occupation Safety & Health Administration; The President of the United States; and The Food & Drug Administration, will be and hereby are DISMISSED pursuant to Fed.R. Civ. P. 12(b (1),(2) and (6). Plaintiff is reminded that should he decide to appeal this

decision, he must file a notice of appeal with the Clerk of the District Court within thirty (30) days from the entry of this Order.

Fed. R. Appellate P. 4 (a).

As also discussed in the accompanying Memorandum Opinion, plaintiff is further reminded that should he desire to respond to the State defendants' demurrer and motion to dismiss, he should do so by Wednesday, August 26, 1992.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: 11 Aug., 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THOMAS A. CRUMP,
Plaintiff

V.
DEPARTMENT OF HEALTH &
HUMAN SERVICES, et al.,
Defendants

MEMORANDUM OPINION

1.

THIS MATTER is before the Court on a motion to dismiss by the Federal defendants and on a demurrer and motion to dismiss by the State defendants. For the reasons stated hereinbelow, the federal defendants' motion to dismiss is GRANTED.

On April 20, 1992, plaintiff, proceeding pro se, filed a suit in Chancery in Henrico County Circuit Court, against the following defendants:

> The Department of Health & Human Services;
> The Environmental Protection Agency;
> The United States Congress;
> The Occupation Safety & Health Administration;

The Virginia General Assembly'
The President of the United States
The Governor of Virginia; and
The Food & Drug Administration

Plaintiff alleges that in November, 1991 while he was in the Henrico County Courts Building, he observed someone smoking a cigarette in an alleged no-smoking area. Plaintiff asserts his right to redress violations of "natural and civil rights" under the Preamble and the 1st, 9th, and 14th amendments of the Constitution because of the smoking which occurred in the Henrico Courts Building. As a result, Mr. Crump prays for the Court to enjoin the named defendants to take action. He requests the Court to prohibit all smoking in the Henrico Courts Building and all State buildings; he further requests the Court to close all cigarette manufacturing plants in Virginia and in the United States and enjoin the manufacture and sale of

cigarettes.

On May 13, 1992, the United States attorney, representing the federal defendants, removed the Henrico County action to this Court. On May 19, 1992, the government filed a motion to dismiss on behalf of all federal defendants based on sovereign immunity and failure to state a federal cause of action for which relief may be granted. The Plaintiff was sent a Roseboro Order directing him to file any response by June 9, 1992. Plaintiff was granted two extensions of time in which to file his response, and on July 17, 1992, his response was filed.

On July 13, 1992 the Virginia Attorney General, representing the State defendants, the General Assembly and the Governor of Virginia, filed copies of its demurrers and motions to dismiss which had been earlier filed in the State court action.

As to the federal defendants, they are immune from suit under the doctrine of sovereign immunity. Sovereign immunity applies to suits against the United States, and absent Congressional consent or a statutory waiver of immunity, the United States is immune from suit and the Court is without jurisdiction to entertain an action. E.g., United States v. Sherwood, 312 U.S.584, 586087 (1941) Where, as here, the defendant federal agencies, legislature and the President are acting in their official capacities, an action against the United States. As such, the federal defendants are immune from suit, and plaintiff's action is DISMISSED for lack of jurisdiction against the federal defendants. Fed.R. Civ. P. 12(b), (1) & (2).

Were the federal defendants not

immune from suit, and had this court had juris-diction to entertain plaintiff's action, plaintiff's action must be DISMISSED for failure to state a cause of action upon which relief can be granted. Fed.R.Civ.P. 12 (b) (6). The alleged violation of a no-smoking ordinance in an Henrico County Court Building is not a violation of federal law, and it is not alleged that any of the named federal defendants either violated that law or refused to enforce that law. Whereas Virginia has laws limiting smoking in public buildings, it is not the duty of the federal government to enforce Virginia's laws; Virginia, through its police powers, has that authority. Absent any constitutional or statutory violations, plaintiff has failed to state any claim or wrong which requires the Court to enjoin the State of Virginia or the County of Henrico.

As to enjoining the manufacture and sale of cigarettes in Virginia and throughout the country, plaintiff again has failed to state a cause of action upon which relief can be granted. While plaintiff's motivations are noble, the Court cannot enjoin activity which is lawful. Plaintiff is advised that his concerns might be better addressed through political means, such as by educating and enlightening the voting public and their elected representatives.

111.

The State defendants have filed a demurrer and a motion to dismiss. Plaintiff is proceeding pro se (without an attorney).

Plaintiff is hereby reminded that he has the right to oppose the State defendants' demurrer and motion to dismiss. He may oppose this motion with any matter he wishes to offer in

rebuttal. Such material may be in the form of a memorandum in opposition, stating his version of the relevant facts and law, or affidavits. An affidavit is a sworn, signed and notarized statement by a person having first-hand knowledge of the facts to which the statement refers. Plaintiff may also file any other material he deems appropriate, including copies of any relevant documents or papers.

Plaintiff must submit such materials, if any, to the Clerk of this Court no later than Wednesday, August 26, 1992. Plaintiff's failure to submit any such material in opposition to the State defendants' motion may result in entry of judgment for the defendant (and against the plaintiff) based on defendant's demurrer and motion to dismiss.

Plaintiff is also reminded that no documents submitted by him will be filed

by the Clerk unless he attaches a certificate stating that he has served or will serve a copy of the documents on the other party's attorney. This certificate of service must show the date and manner of service. Local Rule 11 (F), United States District Court for the Eastern District of Virginia; Fed. R. Civ. P.5. Let the Clerk send copies of this Order to all parties.

And it is SO ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

Date: 11 Aug., 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 92-CV-336

FILED July 9, 1992

THOMAS A. CRUMP,
Plaintiff

V.

DEPARTMENT OF HEALTH & HUMAN SERVICES, et al.,
Defendants.

ORDER

After due consideration of the motion of defendants, General Assembly of Virginia and Governor of Virginia, and the affidavit of W. Mark Dunn, Assistant Attorney General, Attorney for defendants, for an order permitting these defendants to supply the record of proceeding had in the above-entitled action in Henrico Circuit Court by Affidavit, and it appearing to this Court that the Clerk of Henrico Circuit Court has failed and refused after demand to certify, deliver, and transmit to this Court copies of the record and proceeding

and in Henrico Circuit Court in the above-entitled action, and that these defendants are entitled to the relief requested pursuant to 28 U.S.C. § 1449; it is,

ORDERED that these defendants be, and hereby are, permitted to supply the record of proceeding had in the above-entitled action in Henrico County Circuit Court, specifically the demurrer and motion to dismiss filled on behalf of these defendants, by affidavits of those persons having actual knowledge thereof.

ENTER JUL 9, 1993

James R. Spencer

United States District Judge

RECEIVED

279-P653/291 Jul 6 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No.
92-CV-336

FILED
July 8, 1992

THOMAS A. CRUMP,
Plaintiff

V.

DEPARTMENT OF HEALTH &
HUMAN SERVICES, et al.,
Defendants.

O R D E R

This matter is before the Court on plaintiff's second-Motion for an Extension of Time in which to file his response to the United States government's Motion to Dismiss. Whereas the Court has previously granted plaintiff one 30-day extension. The Court DENIES plaintiff's request for an additional 30 days, however, the Court will and hereby does GRANT plaintiff an additional eight (8) days in which to file his response. Plaintiff is hereby DIRECTED to file his response, if any, To The United States Attorney's Motion

to Dismiss by the close of business on July 17, 1992.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date JUL 8 1992

# # # # # # #

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No.
92 - CV - 336

FILED
JUN 30 1992

THOMAS A. CRUMP,
Plaintiff,

DEPARTMENT OF HEALTH &
HUMAN SERVICES, ET AL.,
Defendants

AMENDED ORDER

THIS MATTER is before the Court on Plaintiff's Motion for an Extension of Time in which to file his response to the United States government's Motion to Dismiss - on June 8, 1992 The Court GRANTED plaintiff's motion for a 30 day extension in which to respond to

defendant's motion, however, the Court inadvertently listed a due date of July 6, 1992, when in fact July 9, 1992 should have been entered. As a result, plaintiff is hereby DIRECTED to respond to the United States Attorney's Motion by July 9, 1992.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date JUN 30, 1992

# # # # # # #

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND VIRGINIA

Civil Action No. 92-CV-336

FILED June 8, 1992

THOMAS A. CRUMP,
Plaintiff,

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
Defendants.

O R D E R

THIS MATTER is before the Court on plaintiff's motion for an Extension of Time in which to file his response to the United States government's Motion to Dismiss. Good cause being shown, the parties not being otherwise prejudiced, the Court GRANTS plaintiff's motion. Plaintiff is hereby DIRECTED to respond to The United States Attorney's motion by July 6, 1992.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date 8 JUN 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No.
92 - CV - 336

FILED
MAY 26 1992

THOMAS A. CRUMP,
Plaintiff,

v.

DEPARTMENT OF HEALTH &
HUMAN SERVICES, ET AL.,
Defendants

O R D E R

The United States Attorney on behalf of all of The Federal defendants in This Action , has filed a motion to dismiss plaintiff's action based on sovereign immunity and for failure to state a federal cause of action. Plaintiff is proceeding pro se (without an attorney).

Plaintiff is hereby reminded that he has the right to oppose defendant's motion to dismiss. He may oppose this motion with any matter he wishes to offer in rebuttal. Such material may be in the form of a memorandum in opposition, stating his version of the relevant facts and law, or Affidavits. An affidavit is

a sworn, signed and notarized statement by a person having first hand knowledge of the facts to which the statement refers. Plaintiff may also file any other material he deems appropriate, including copies of any relevant documents or papers.

Plaintiff must submit such materials, if any, to the Clerk of this Court no later than Tuesday, June 9, 1992. Plaintiff's failure to submit any such material in opposition to defendant's motion may result in entry of judgment for defendant (and against the plaintiff) based on defendant's motion to dismiss.

Plaintiff is also reminded that no documents submitted by him will be filed by the Clerk unless he attaches a certificate stating that she has served or will serve a copy of the document on the other party's attorney. This

certificate of service must show the date and manner of service, Local Rule 11 (F), United States District Court for the Eastern District of Virginia's Fed. R. Civ. P. 5.

Let the clerk send copies of this Order to all parties.

And it is SO ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

Date: May 26, 1992

IN THE CIRCUIT COURT
WASHINGTON COUNTY, MISSISSIPPI

JEANETTE WILKS AND JESSIE WILLIE BELL
Plaintiff,
v.

CAUSE NO. 91-12,244 (B)(W)
Filed: 11th day May, 1993

THE AMERICAN TOBACCO COMPANY AND NEW DEAL TOBACCO AND CANDY COMPANY, INC.
Defendants

RULING

Once again this Court is called upon to decide the standard of tort liability to which the manufacturer of cigarettes is held. The Court has considered this matter anew and concludes that cigarettes are, as a matter of law, defective and unreasonably dangerous for human consumption. Cigarettes are defective because when used as intended, they cause cancer, emphysema, heart disease and other illnesses. That the result reached here imposes absolute liability on the manufacturers of cigarettes for injuries arising from the use of their products is

not a departure from the doctrine is strict liability, rather the logical extension of the doctrine in the light of present day scientific and medical knowledge and the enormous economic burden which cigarettes place on the nation's economy and its health care system in particular.

Cigarettes are the most lethal product which may be legally sold in this country. According to the Affidavit of Dr. David Burns, Senior Reviewer of several Surgeon General's Reports, Cigarettes kill approximately 435,000 persons annually from cancer, emphysema and heart disease. Cigarettes kill more Americans each year than Aids, automobile accidents, alcohol, fires, heroin, morphine, cocaine, suicide and homicide combined. One in four two-pack per day smokers will die of lung cancer. Cigarettes kill 40% of the people who

smoke them. The health cost to the nation from cigarette smoking exceeds $50 billion per year. The health costs associated with cigarette smoking fall upon everyone, the smoker and his family, non-smokers, insurance companies, employers, employees, physicians, hospitals and the taxpayers who pay the bills for many of those hospitals. Everyone, that is, except the cigarette manufacturer.

In State Stove Manufacturing Co. v. Hodges, 189 So.2d 113 (Miss.1966). The Mississippi Supreme Court adopted Section 402A of the Restatement (Second) of Torts (1965) as the standard to which the manufacturer of a product should be held. Section 402A subjects the manufacturer to liability for "any product in a defective condition unreasonably dangerous to the user or consumer." Section 402A owes its origin to Justice Robert Traynor's

opinion in Greenman v. Yuba Power Products, 377 P.2d 897, 900 (Cal. 1963):

> (a) manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

The holding in Greenman reflected the acceptance and adoption by the California Supreme Court of the policy arguments advanced by Justice Traynor in Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal.1944) for holding manufacturers liable for injuries resulting from the use of their defective products without regard to negligence. Justice Traynor said in Escola:

> In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.

150 P.2d at 440.

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an over-whelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly, they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best suited to afford such protection.

150 P.2d at 441.

In decisions which followed Greenman, the California Supreme Court held that a Plaintiff seeking recovery under strict liability in tort was not required to prove that the product's defect made it unreasonably dangerous to the user, Cronin v. J.B.E. Olson Corporation, 501 P.2d 1153 (1972), and that a Plaintiff is not required to prove that he was unaware of the defect, Luque v. McLean, 501 P.2d 1163 (1972). Furthermore, the Court said in Pike v. Frank G. Hough Company, 467 P.2d 229,235 (1970) "the modern approach does not preclude liability solely because the danger is obvious."

It is clear that to effectuate the policy objectives underlying the doctrine of strict liability - the reduction of hazards to life and health and placing responsibility on the manufacturer for injuries caused by his defective

products-cigarettes manufacturers must be held liable for the deaths and disease arising from the use of their products.

Plaintiff's motion to impose absolute liability on Defendants is granted. The issues of causation and damages remain for determination by a jury.

Assumption of Risk and Comparative Fault

The Mississippi Supreme Court has held that the spite of our comparative fault statute, MCA § 11-7-5, assumption of risk remains a viable defense in Mississippi and that it may be invoked in a proper case arising under strict liability. Nichols v. Western Auto Supply Co., Inc., 477 S.2d 261 (Miss.1985) Unfortunately, the Mississippi Supreme Court has failed to articulate clear standards for trial courts to employ in determining whether a case is proper for assumption of risk as

opposed to comparative fault. In Braswell v. Economy Supply Co., 281 Swd 669 (Miss.1973), the Court said that where assumption of risk overlaps and coincides with contributory negligence, the latter should apply. In Yarbrough v. Phipps, 285 S.2d 788,790 (1973) the Court held that in order for an assumption of risk instruction to be given, the trail court must find the plaintiff's conduct was "venturous." The Court in Alley v. Praschak Machine Co., 366 S2d 661 (1979) upheld the granting of an assumption of risk instruction, but the opinion's author, Justice Roy Noble Lee, stated in a footnote that "where the assumption of risk doctrine would apply, the negligence of the injured party, for practical purposes, would have to be the sole proximate cause of the accident, and such issues should be submitted to the jury rather than assumption of risk." 366 S2d

at 665.

Justice Lee's statement recognizes that assumption of risk and comparative fault overlap only at one point, where the Plaintiff's negligence is the sole proximate cause of his injury. Stated another way, the doctrines overlap when the Plaintiff's contributory negligence is 100%. An instruction that an injured Plaintiff may not recover when his negligence was the sole proximate cause of this injury is the functional equivalent of assumption of risk. Such an instruction conforms to the comparative fault scheme, complies with the Court's admonishment that assumption of risk should rarely be submitted to jury and focuses the jury's attention on the important issue, causation. In the case presently before the Court, there is no evidence of any conduct on the part of Plaintiffs' decedent which may be

characterized as venturous. Plaintiffs' motion to strike the assumption of risk defence is granted, and the court will proceed to decide whether comparative fault is an available defense in this case.

The Mississippi Supreme Court has recognized contributory negligence as a limitation on damages in claims arising in strict liability, Ford Motor Co. v. Matthews, 201 S.2d 169 (Miss.1974); Early-Gary, Inc. v. Walters, 294 S2d. 181 see also, Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir.1975). However, the cases approving a contributory negligence instruction have arisen in cases where the evidence showed that the injured Plaintiff misused or abnormally handled the product. No such claim is made here. Plaintiffs' decedent did with Pall Mall Cigarette what Defendants intended be done, he smoked

them. Defendants may not be heard to argue that Plaintiffs' decedent was somehow contributorily negligent because he smoked their "ordinary, well-made cigarettes."

Plaintiff's Motion to strike the comparative fault/contributory negligence defense is granted.

Defendants' Motion for partial summary judgment on Plaintiffs' design defect-alternative design claim, manufacturing defect claim and breach of implied warranty claim is denied.

Defendants' Motion for partial summary judgment on Plaintiffs' claims under a risk utility theory, Defendants' Motion for partial summary judgment on Plaintiffs failure to warn claim and Defendants' Motion for partial summary judgment on Plaintiffs' point-June 30, 1969 advertising and promotion claims are rendered moot.

SO ORDERED, this the 11th day of May, 1993.

Eugene Bogen

CIRCUIT JUDGE

FEDERAL CIGARETTE LABELING and ADVERTISING ACT of 1965 (Public Law 89-92) This law, which became effective January 1, 1966 was the first of a continuing series of federal statutes enacting warning labels to inform the public about the health hazards of smoking, subsequently, the use of other tobacco products. Presently, the comprehensive Smoking Education Act (Public Law 98-474) Title 15, 1331 of the U.S. Code requires cigarette companies to rotate four health warnings on all cigarette packages and in advertisements.

CHAPTER 8.1.

Virginia Indoor Clean Air Act

Sec.

15.1-291.1. Definitions.

15.1-291.2. Statewide regulation of smoking.

15.1-291.3. Responsibility of building proprietors and managers.

15.1-291.4. Local ordinances regulating smoking.

15.1-291.5. Mandatory provisions of local ordinances

15.1-291.6 Optional provisions of local ordinances

15.1-291.7 Exceptions

15.1-291.8 Chapter's application to certain local ordinances.

15.1-291.9 Posting of signs.

15.1-291.10 Enforcement of local ordinances

15.1-291.11 Construction of chapter with respect to other applicable law.

§ 15.1-291.1. Definitions. -- As used in this chapter unless the context requires a different meaning:

"Bar or lounge area" means any establishment or portion of an establishment where one can consume alcoholic beverages and hors d'oeuvres, but excluding any such establishment or portion of the establishment having tables or seating facilities where, in consideration of payment, meals are served.

"Educational facility" means any building used for instruction of enrolled students, including, but not limited to,

any day-care center, nursery school, public or private school, college university, medical school, law school, or vocational school.

"Health care facility" means any institution, place, building, or agency required to be licensed under Virginia law, including, but not limited to, any or ambulatory medical and surgical center.

"Person" means any person, firm, partnership, association, corporation, company, or organization of any kind.

"Private work place" means any office or work area which is not open to the public in the normal course of business except by individual invitation.

"Proprietor" means the owner or lessee of the public place, who ultimately controls the activities within the public place. The term "proprietor" includes corporation, associations, or

partnerships as well as individuals.

"Public conveyance" or "public vehicle" means any air, land, or water vehicle used for the mass transportation of persons in intrastate travel for compensation, including, but not limited to, any airplane, train, bus, or boat that is not subject to federal smoking regulations.

"Public place" means any enclosed, indoor area used by the general public, including, but not limited to, any building owned or leased by the Commonwealth or any agency thereof or any county, city, or town, public conveyance or public vehicle, restaurant, educational facility, hospital, nursing home, other health care facility, library, retail store of 15,000 square feet or more, auditorium, arena, theater, museum, concert hall, or other area used for a performance or an exhibit of the

arts or sciences, or any meeting room.

"Restaurant" means any building, structure, or area, excluding a bar or lounge area as defined in this chapter, having a seating capacity of fifty or more patrons, where food is available for eating on the premises, in consideration of payment.

"Smoke" or "smoking" means the carrying or holding of any lighted pipe, cigar, or cigarette of any kind, or any other lighted smoking equipment, or the lighting, inhaling, or exhaling of smoke from a pipe, cigar, or cigarette of any kind.

"Theater" means any indoor facility or auditorium, open to the public, which is primarily used or designed for the purpose of exhibiting any motion picture, stage production, musical recital, dance, lecture, or other similar performance. (1990, cc.902, 969.)

§ 15.1-291.2. Statewide regulation of smoking. - A. The Commonwealth or any agency thereof and every county, city, or town shall provide reasonable no-smoking areas, considering the nature of the use and the size of the building, in any building owned or leased by the Commonwealth or any agency thereof or a county, city, or town. The provisions of this chapter shall not apply to office, work or other areas of the Department of Corrections which are not entered by the general public in the normal course of business or use of the premises.

B. Smoking shall be prohibited in (i) elevators, regardless of capacity, except in any open material hoist elevator, not intended for use by the public; (ii) public school buses; (iii) common areas in any public elementary, intermediate, and secondary school, including, but not limited to classrooms, libraries,

hallways, auditoriums and other facilities; (iv) hospital emergency rooms; (v) local or district health departments; (vi) polling rooms; and Ivii) indoor service lines and cashier lines.

C. Any restaurant having a seating capacity of fifty or more persons shall have a designated no-smoking area sufficient to meet customer demand. In determining the extent of the no-smoking area, the following shall not be included as seating capacity: (i) seats in any bar or lounge area of a restaurant and (ii) seats in any separate room or section of a restaurant which is used exclusively for private functions.

D. The proprietor or other person in charge of an educational facility, health care facility, or a retail establishment of 15,000 square feet or more serving the general public, including, but not

limited to, department stores, grocery stores, drug stores, clothing stores, and shoe stores, shall designate reasonable no-smoking areas, considering the nature of the use and the size of the building.

E. The proprietor or other person in charge of a space subject to the provisions of this chapter shall post signs conspicuous to public view stating "Smoking Permitted" or "No Smoking," and in restaurants, signs conspicuous to ordinary public view at or near each public entrance stating "No-Smoking Section Available." Any person failing to post such signs may be subject to a civil penalty of not more than twenty-five dollars.

F. No person shall smoke in a designated no-smoking area and any person who continues to smoke in such area after having been asked to refrain from smoking may be subject to a civil penalty of not

more than twenty-five dollars.

G. Any law-enforcement officer may issue a summons regarding a violation of this Act.

H. The provisions of this chapter shall not be construed to regulate smoking in retail tobacco stores, tobacco warehouses or tobacco manufacturing facilities. (1990, cc. 902, 969; 1991, c. 601; 1992, c. 827).

§ 15.1-291.3. Responsibility of building proprietors and managers. - The proprietors or person who manages or otherwise controls any building, structure, space, place, or area governed by this chapter in which smoking is not otherwise prohibited may designate rooms or areas in which smoking is permitted as follows:

1. Designated smoking areas shall not encompass so much of the building,

structure, space, place, or area open to the general public that reasonable no-smoking areas, considering the nature of the use and the size of the building, are not provided.

2. Designated smoking areas shall be separate to the extent reasonably practicable from those rooms or areas entered by the public in the normal use of the particular business or institution; and

3. In designated smoking areas, ventilation systems and existing physical barriers shall be used when reasonably practicable to minimize the permeation of smoke into no-smoking areas. However, this chapter shall not be construed as requiring physical modification or alterations to any structure. (1990, cc. 902, 969.)

§ 15.1-291.4. Local ordinances

regulating smoking. -- A. No ordinances enacted by a county, city, or town prior to January 1, 1990, shall be deemed invalid or unenforceable because of lack of consistency with the provisions of this chapter.

B. Unless specifically permitted herein, local ordinances adopted after January 1, 1990, shall not contain provisions or standards which exceed those established in this chapter. (1990, cc. 902, 969.)

§ 15.1-291.5. Mandatory provisions of local ordinances. -- Any local ordinance shall provide that it is unlawful for any person to smoke in any of the following places:

1. Elevators, regardless of capacity.

2. Common areas in an educational facility, including, but not limited to, classrooms, hallways, auditoriums, and

public meeting rooms;

3. Any part of a restaurant designated a no-smoking" area pursuant to the provisions of this chapter;

4. Indoor service lines and cashier areas; and

5. School buses and public conveyances. (1990, cc. 902, 969.)

§ 15.1-291.6. Optional provisions of local ordinances. -- Any local ordinance may provide that management shall designate reasonable no-smoking areas, considering the nature of the use and the size of the building, in the following places:

1. Retail and service establishments of 15,000 square feet or more serving the general public, including, but not limited to, department stores, grocery stores, drug stores, clothing stores, and shoe stores;

2. Rooms in which a public meeting or hearing is being held;

3. Places of entertainment and cultural facilities, including, but not limited to, theaters, concert halls, gymnasiums, auditoriums, other enclosed arenas, art galleries, libraries, and museums;

4. Indoor facilities used for recreational purposes;

5. Other public places; and

6. Any restaurant having a seating capacity of fifty or more persons shall have a designated no-smoking area sufficient to meet customer demand. In determining the extent of the no-smoking area, the following shall not be included as seating capacity: (i) seats in any bar or lounge area of a restaurant and (ii) seats in any separate room or section of a restaurant which is used exclusively for private functions. (1990,

cc. 902, 969.)

§ 15.1-291.7. Exceptions. -- The provisions of §§ 15.1-291.4 through 15.1-291.6 shall not be construed to allow local ordinances to regulate smoking in:

1. Bars and lounge areas;

2. Retail tobacco stores;

3. Restaurants, conference or meeting rooms, and public and private assembly rooms while these places are being used for private functions;

4. Office or work areas which are not entered by the general public in the normal course of business or use of the premises;

5. Areas of enclosed shopping centers or malls that are external to the retail stores therein, are used by customers as a route of travel from one store to another, and consist primarily of walkways and seating arrangements; and

6. Lobby areas of hotels, motels,

and other establishments open to the public for overnight accommodations. (1990, cc. 902, 969.)

§ 15.1-291.8. Chapter's application to certain local ordinances. -- Local ordinances adopted after January 1, 1990, shall not contain provisions or standards which exceed those established in this chapter. However, any local ordinance may provide that employers may regulate smoking in the private work place as they deem appropriate under the following circumstances: (i) if the designation of smoking and no-smoking areas is the subject of a written agreement between the employer and his employees, the provisions of the written agreement shall control such designation and (ii) a total ban on smoking in any work place shall only be enforced by the employer upon an affirmative vote of a majority of the

affected employees voting, unless such ban is the subject of a contract of employment between the employer and the employees as a prior condition of employment. No such ordinance shall affect no-smoking policies established by employers prior to the adoption of such ordinance. (1990, cc. 902, 969.)

§ 15.1-291.9 Posting of signs. -- Any person who owns, manages, or otherwise controls any building or area in which smoking is regulated by a local ordinance shall post in an appropriate place, in a clear, conspicuous, and sufficient manner, "Smoking Permitted" signs, "No Smoking" sings, or "No-Smoking Section Available signs. (1990, cc. 902, 969.)

§ 15.1-291.10. Enforcement of local ordinances. -- A. Any local ordinance may

provide a civil penalty of not more than twenty-five dollars for violations of any provision of such local ordinance.

B. Any local ordinance may provide that no person shall smoke in a designated no-smoking area and any person who continues to smoke in such area after being asked to refrair from smoking may be subject to a civil penalty of not more than twenty-five dollars.

C. Any local ordinance shall provide that any law-enforcement officer may issue a summons regarding a violation of the ordinance. (1990, cc. 902, 969; 1992, c. 827.)

§ 15.1-291.11. Construction of chapter with respect to other applicable law. -- This chapter shall not be construed to permit smoking where it is otherwise prohibited or restricted by other applicable provisions of law.